85227-8
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NO. 64437-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION ONE

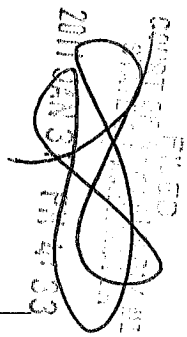
STATE OF WASHINGTON,

Appellant,

v.

CESAR CIENFUEGOS,

Respondent.



ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Steven C. Gonzalez, RALJ Judge

BRIEF OF RESPONDENT

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RULES, STATUTES AND OTHER (Cont'd)

A. RESPONSE TO ASSIGNMENTS OF ERROR

1. The superior court properly held exhibit 10 (CP 459) is a testimonial statement and its admission violated respondent's confrontation rights. CP 495-98.

2. The superior court properly reversed respondent's conviction. CP 498.

3. The superior court properly remanded for dismissal. CP 498.

4. The state's other assignments of error are not properly before this Court as they exceed the scope of the motion seeking review and the ruling granting review. See argument 2, infra.

Restatement of Issues Related to Assignments of Error

1. The government official's opinions and conclusions in Exhibit 10 were prepared solely for the purpose of litigation and were testimonial hearsay under recent decisions from the United States Supreme Court. Did the superior court properly rely on Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), in holding that admission of Exhibit 10 violated Cienfuegos' right to confront the witnesses against him?

2. Is the state's harmless error claim meritless?

3. Are the state's other issues beyond the scope of review?

4. If the state's other issues are properly raised, are they nonetheless meritless?

B. STATEMENT OF THE CASE

The state charged respondent Cesar Cienfuegos with first degree driving while his license was suspended.[1] The incident occurred April 15, 2005. CP 200; RCW 46.20.342(1)(a). At trial, over defense objection, the state offered exhibits 10 and 11.[2]

Exhibit 10 is a cover letter and affidavit signed under penalty of perjury by Denise Bausch, a DOL records custodian. It asserts that attached "document(s) is/are a true and accurate copy of the document(s) maintained" by DOL regarding Cienfuegos' driving record. CP 460. It further states:

> After a diligent search of the computer files, the official record indicates on April 15, 2005, the following statements apply to the status of the above named person:

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[1] Cienfuegos also was charged with driving without an ignition interlock device. CP 200; RCW 46.20.740(2). In light of the state's concession on appeal, that conviction was vacated and the charge dismissed without prejudice. CP 353-55, 433, 444, 500.

[2] Copies of exhibits 9, 10, and 11 are attached as appendix A.

> Had not reinstated his/her driving privilege. Was suspended/revoked in the first degree. Subject was not eligible to reinstate his/her driving privilege on the above date of arrest.
>
> Had not been issued a valid Washington license.
>
> A notation has been placed on the driving record under RCW 46.20.720 stating that the person may operate only a motor vehicle equipped with an ignition interlock or other biological or technical device from 10/20/2002 to 10/20/2005.

CP 460 (Ex. 10). Cienfuegos objected to exhibit 10 on several grounds, in limine and at trial. He raised a confrontation claim. CP 214-16, 319-22.

On appeal to the superior court, Cienfuegos argued the district court erred in admitting exhibit 10 in violation of his confrontation rights. CP 360-61 (citing, inter alia, Melendez-Diaz v. Massachusetts, __ U.S. __, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009)). The superior court agreed, recognizing Melendez-Diaz as binding constitutional authority. CP 495-98.

The court concluded the cover letter and affidavit "is neither a business record nor a public record." CP 496. While a database of information may be kept within the normal course of DOL business, the certificate of a diligent search of the database, and the effect of what was and was not found, were not. The document

was prepared solely for litigation to prove a fact at a criminal trial. CP 497. "[T]he CCDR includes not just the contents of the DOL records, but also the DOL official's interpretation of what the records contain, and purports to certify to its substance and effect." CP 497.

The superior court held the error was prejudicial because Exhibit 10 was the only direct evidence that the habitual traffic offender revocation was still in effect on April 15, 2005. CP 498 (citing CP 27, the "to-convict" instruction).

Cienfuegos also challenged exhibit 11, arguing it was unfairly prejudicial and irrelevant. CP 248-51, 321-23, 356-60. The court agreed and found reversible error for this and two other reasons. CP 499-500. The state sought review of the Melendez-Diaz claim, and review was granted of that sole claim. See argument 2, infra (discussing the state's new claims that exceed the narrow scope of review).

C. ARGUMENT

1. EXHIBIT 10 IS TESTIMONIAL AND THE SUPERIOR COURT PROPERLY HELD ITS ADMISSION VIOLATED CIENFUEGOS' CONFRONTATION RIGHTS.

A person accused of a criminal offense has the right to confront his accusers. U.S. Const. amend. 6;[3] Const. art. 1, § 22;[4] Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); State v. Jasper, __ Wn. App. __, __ P.3d __, 2010 WL 5392937 (2010). The superior court held the admission of Exhibit 10 violated Cienfuegos' confrontation rights and required reversal. CP 496-98. This Court should affirm.

The state claims the DOL documents were properly admitted under two theories: (1) certified copies of DOL records are admissible as public records, and (2) Exhibit 10 is not testimonial.

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[3] "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]"

[4] "In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]"

Brief of Appellant (BOA) at 8-20. The Court of Appeals recently rejected both. Jasper, 2010 WL 5392937 at *2-7.

a. Admission of Exhibit 10 Was Constitutional Error.

The state charged Jasper with driving while his license was suspended, in violation of RCW 46.20.342(1)(c).[5] Over Jasper's confrontation objection, the trial court admitted a cover letter and affidavit from the DOL records custodian attaching driving records. That affidavit asserted "After a diligent search, our official record indicates that the status on February 14, 2005, was: . . . Suspended in the third degree." Jasper, 2010 WL 5392937 at *1 & n.1.

At trial, an officer testified Jasper admitted his license was suspended. Jasper also testified he knew his license was suspended on the date of the collision. Jasper, at *1, ¶¶ 5-6. Jasper was convicted.

On appeal, Jasper argued admission of the DOL record custodian's affidavit violated his confrontation rights. The Court of Appeals agreed. Jasper, at **2-7 (citing, inter alia, Melendez-Diaz and Crawford). Crawford held the confrontation clause was principally directed at the "use of ex parte examinations and ex

[5] Jasper was also charged and convicted of felony hit-and-run. Jasper, 2010 WL 5392937 at * 1-2.

parte affidavits as substitutes for live witnesses in criminal cases." Jasper, at *2. The clause is generally limited to witnesses who bear testimony. The core class of testimonial statements include:

> [1] ex parte in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; [2] extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; [3] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Jasper, at *2 (quoting Crawford, 541 U.S. at 51-52).[6]

Following Crawford, the Melendez-Diaz court addressed the admission of statements from lab analysts who declared a substance was examined and found to contain cocaine. The court held the analysts's "certificates of analysis" were testimonial statements because they were (1) functionally equivalent to live, in-

[6] Crawford also noted that reports prepared for the purpose of litigation are testimonial. See Crawford, 541 U.S. at 47 n.2 & 49-50 (discussing State v. Campbell, 1 Rich. 124, 1844 WL 2558 (S.C.1844)). The framers intended the Confrontation Clause to avoid the evils caused by trial and conviction of persons based on the affidavits of government witnesses who do not testify. As the Supreme Court recognized, "[i]nvolvement of government officers in the production of testimony with an eye toward trial presents a unique potential for prosecutorial abuse." Crawford, at 56 n.7.

court testimony, and (2) were "made under circumstances which would lead an objective witness reasonably to believe that the statement[s] would be available for use at a later trial." Melendez-Diaz, 129 S.Ct. at 2532 (quoting Crawford, 541 U.S. at 52). Concluding the Sixth Amendment does not allow the state to prove its case through ex parte out-of-court affidavits, the admission of the statements violated the constitution. Melendez-Diaz, 129 S.Ct. at 2542.

Addressing Melendez-Diaz in the context of the DOL cover letter and affidavit, the Jasper court quoted language from Melendez-Diaz that precludes a clerk from "creat[ing] a record for the sole purpose of providing evidence against a defendant." Jasper, at *3 (quoting Melendez-Diaz, 129 S.Ct. at 2359).[7] Although the common law might allow some official and business records to escape confrontation, the court recognized it did not allow "a clerk's certificate attesting to the fact that the clerk had

[7] Cf. State v. Kirkpatrick, 160 Wn.2d 873, 885, 161 P.3d 990 (2007) ("the public record here, at least the certification, was literally prepared for purposes of litigation and was intended to be relied upon by the State. Likewise, the DOL certification here was probably not kept in the normal course of DOL business.").

searched for a particular relevant record and failed to find it." Jasper, at *4 (quoting Melendez-Diaz, 129 S.Ct. at 2539).[8]

The cover letter and affidavit admitted in Jasper failed confrontation scrutiny because the affidavit "contains ex parte statements made for the purpose of establishing the fact that Jasper was driving with a suspended license on the day of the collision." Jasper, at *5. The affiant claimed to make a "diligent search" for relevant records. This implied the affiant "knew what records to search for, knew how to find them in the database, and conducted the search correctly." Id. The affidavit also stated Jasper's license was suspended on a particular day, "explaining what the results of the records search revealed and what the witness concluded from the records searched." Id. These are not mere statements of authenticity. Id. Such records are "substantive evidence against the defendant whose guilt depended on the nonexistence of the record for which the clerk searched." Melendez-Diaz, 129 S.Ct. at 2539. Confrontation is not only

[8] "A clerk could by affidavit authenticate or provide a copy of an otherwise admissible record, but could not do what the analysts did here: create a record for the sole purpose of providing evidence against a defendant." Melendez-Diaz, 129 S.Ct. at 2539.

designed to weed out the fraudulent witness, but also the witness who is incompetent at the job. Id., at 2537.

The Jasper court also recognized the letter and affidavit did not exist in DOL records independently of the pending charge. The affidavit instead "was plainly created in order to provide evidence against him for purposes of prosecuting him – a circumstance that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Jasper, at *5 (citing Crawford, 541 U.S. at 51-52).[9] "Indeed, the affidavit declares that Jasper's driving status was 'Suspended in the third degree,' a statement not contained in either of the two agency records attached to the affidavit and submitted therewith." Jasper, at *5.

The Jasper court also recognized the Washington Supreme Court's post-Crawford but pre-Melendez-Diaz decisions in State v. Kirkpatrick and State v. Kronich.[10] Those cases had held that DOL

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[9] See also, Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (recognizing as testimonial a certificate created by a government employee for the sole purpose of establishing a fact at trial).

[10] State v. Kirkpatrick, 160 Wn.2d 873, 161 P.3d 990 (2007); State v. Kronich, 160 Wn.2d 893, 161 P.3d 982 (2007).

certificates – which stated the drivers did not have a license or the license was suspended on a particular date – were not testimonial.[11] But Melendez-Diaz superseded these decisions on the Sixth Amendment question, and Washington courts are bound by the United States Constitution as interpreted by the United States Supreme Court. Jasper, at *4 (citing State v. Radcliffe, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)). The trial court therefore erred in admitting the testimonial statements without allowing Jasper to confront the witness. Jasper, at *7, ¶ 27.

Jasper is joined in this conclusion by decisions from other jurisdictions. See e.g., United States v. Martinez-Rios, 595 F.3d 581, 586 (5th Cir. 2010) (certificate of nonexistence of record is testimonial); United States v. Orozco-Acosta, 607 F.3d 1156, 1161 n. 3 (9th Cir. 2010) (accepting government's concession of same)[12]; State v. Alvarez-Amador, 235 Or.App. 402, 405, 410-11, 232 P.3d

[11] The specific document at issue in Kronich was described as "a certified statement regarding the status of Kronich's driving privilege" from the DOL. Kronich, 160 Wn.2d at 898. In Kirkpatrick, the document was a certification that no license had been issued to a 15-year-old defendant. Kirkpatrick, 160 Wn.2d at 878.

[12] The certificate in Orozco-Acosta stated, in part, "after a diligent search [of two agency databases,] no record was found to exist indicating that [Orozco-Acosta] obtained consent ... for re-admission in the United States." 607 F.3d at 1161.

989 (2010) (affidavit stating social security number did not belong to accused was testimonial); Washington v. State, 18 So.3d 1221 (Fla. App. 2009) (certificate of non-licensure is testimonial); Tabaka v. District of Columbia, 976 A.2d 173 (D.C. 2009) (certificate of no record of license is testimonial). Tea-leaf readers also have good cause to suspect the United States Supreme Court does not favor the state's effort to limit what the state calls "dicta" in Melendez-Diaz. In United States v. Norwood, the Ninth Circuit held that a certificate of nonexistence of record (CNR) was not testimonial. The Supreme Court granted certiorari, vacated the decision, and remanded[13] for further consideration in light of Melendez-Diaz. The government then conceded the point on remand. United States v. Norwood, 555 F.3d 1061, 1066 (2009), vacated and remanded for

[13] This abbreviated review is typically called a "GVR." See e.g., Wellons v. Hall, __ U.S. __, 130 S.Ct. 727, 731, __ L.Ed.2d __ (2010); Briscoe v. Virginia, 559 U.S. __, 130 S.Ct. 1316, __ L.Ed.2d __ (2010) (granting, vacating, and remanding for further consideration in light of Melendez-Diaz), on remand, Cypress v. Commonwealth, 280 Va. 305, 699 S.E.2d 206 (2010). "A GVR is appropriate when 'intervening developments ... reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome' of the matter." Wellons, 130 S.Ct. at 731 (quoting Lawrence v. Chater, 516 U.S. 163, 167, 116 S.Ct. 604, 133 L.Ed.2d 545 (1996) (per curiam)).

reconsideration in light of Melendez-Diaz, Norwood v. United States, __ U.S. __, 130 S. Ct. 491, 175 L.Ed. 2d 339 (2009), amended and superseded, 603 F.3d 1063, 1067 (9th Cir. 2010), cert. denied, __ U.S. __, 131 S.Ct. 225, 178 L.Ed.2d 250 (2010).[14]

Furthermore, the authority relied on by the Kirkpatrick court has either been overruled or clarified following Melendez-Diaz. See Kirkpatrick, at 883 (citing Dowdell v. United States, 221 U.S. 325, 31 S.Ct. 590, 55 L.Ed. 753 (1911); cf. Melendez-Diaz, 129 S.Ct. at 2539 n. 8 (rejecting the dissent's similar reliance on Dowdell)); Kirkpatrick, at 884 (citing two cases since overruled)[15]; Kronich, 160 Wn.2d at 902-04 (relying in large part on Kirkpatrick).

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[14] Although has become somewhat common for the Ninth Circuit to be reversed when it issues a "liberal" decision that "overprotects" the constitutional rights of people charged with crimes, reversals are much rarer when it "conservatively" rejects constitutional claims raised by such litigants. The GVR in Norwood therefore provides substantial insight. In reply, the state may point out that the Supreme Court recently denied review of the Maine Supreme Court's decision in State v. Murphy, 991 A.2d 35, 2010 ME 28 (Me. 2010), cert. denied, Murphy v. Maine, 131 S.Ct. 515 (2010). However, unlike the GVR in Norwood, the denial of certiorari may be due to any of a wide variety of reasons and therefore has no precedential value. Teague v. Lane, 489 U.S. 288, 296, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); Evans v. Stephens, 544 U.S. 942, 942, 125 S.Ct. 2244, 161 L.Ed.2d 510 (2005) (Stevens, J., opinion respecting the denial of certiorari).

[15] United States v. Cervantes-Flores, 421 F.3d 825, 834 (9th Cir. 2005), cert. denied, 547 U.S. 1114 (2006), overruling recognized

For these reasons, admission of exhibit 10 violated Cienfuegos's confrontation rights.

b. The State Cannot Satisfy its Burden to Show the Constitutional Error Was Harmless.

The Jasper court next addressed the state's harmless error theories. The state relied most heavily on Jasper's own testimony he believed his license was suspended. But he did not state the reason(s) for the suspension, and the possibility that he had appealed the suspension, or otherwise taken care of the reason(s) for the suspension, was not ruled out by other evidence in the record. Jasper, at *8. For these reasons, the state could not show the error harmless beyond a reasonable doubt. Jasper, at *7-8.

When applied to Cienfuegos' case, Jasper requires reversal. Admission of Exhibit 10 violated the Sixth Amendment and the state cannot show it is harmless beyond a reasonable doubt. Jasper, at * 7 (constitutional error is presumed prejudicial and the state bears the burden to show confrontation error harmless beyond a reasonable doubt) (citing State v. Stephens, 93 Wn.2d

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by, U.S. v. Orozco-Acosta, 607 F.3d 1156, 1161 n.3 (9th Cir. 2010), cert. denied, Orozco-Acosta v. United States, 2011 WL 55673, 79 USLW 3400 (Jan 10, 2011); United States v. Rueda-Rivera, 396 F.3d 678, 680 (5th Cir. 2005), overruled by, United States v. Martinez-Rios, 595 F.3d 581 (5th Cir. 2010).

186, 190-91, 607 P.2d 304 (1980)).[16] The constitutional harmless error standard provides that "a conviction should be reversed 'where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.'" Jasper, at *8 (quoting State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

The "to-convict" instruction included four elements the state had to prove beyond a reasonable doubt. The two pertinent elements are: "[t]hat at the time of driving an order of revocation was in effect; [and] [t]hat the order of revocation was based on a finding by the Department of Licensing that the defendant was a habitual traffic offender[.]" CP 27.

In arguing the state had proved these elements, the trial prosecutor not only emphasized exhibit 10, but quoted it at length. CP 399-400, 402, 443-44, 446.[17] Appellate courts often reject a state's appellate claim that an error is "harmless" where the trial

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[16] The state's brief omits the standard and the state's burden. BOA at 21.

[17] The state's brief in this Court does not mention the prosecutor's closing argument or the state's reliance on exhibit 10 in its response to the RALJ appeal.

deputy emphasized the inadmissible evidence at trial.[18] Appellate courts are not easily misled when transparently contradictory positions are asserted in different forums. State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990) (appellate courts will closely scrutinize state's harmless error claim where the error resulted from state's deliberate effort to admit evidence at trial). The trial deputy's closing argument, by itself, defeats the state's effort to prove the error harmless in this Court.

The state contrarily claims the error could be found harmless for several reasons. The state first contends the inadmissible testimonial parts of exhibit 10 may be "excised." BOA at 20.[19] Where this claim was not raised in the trial court, in the superior court,[20] or in its motion for discretionary review in this Court, the claim is waived. See argument 2, infra; see also, Cox v. General

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[18] For a small sample, see, State v. Easter, 130 Wn.2d 228, 230, 242-43, 922 P.2d 1285 (1996); State v. Carnahan, 130 Wn. App. 159, 169, 122 P.3d 187 (2005); State v. Fleming, 83 Wn. App. 209, 216, 921 P. 2d 1076 (1996); State v. Padilla, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

[19] The state does not explain what might be "excised" when all of the offered factual proof follows the affiant's claim to have made a "diligent search" of DOL records. CP 460. Without the "diligent search," the remainder is simply irrelevant.

[20] CP 319-21, 447-53.

Motors Corp., 64 Wn. App. 823, 826, 827 P.2d 1052 (1992) (the failure to timely raise an issue generally waives it). The state's novel and unexplained "excision" theory also overlooks the trial and RALJ prosecutors' contrary and extensive reliance on an "unexcised" exhibit 10. CP 400, 402-03, 446. The doctrine of judicial estoppel should apply here to prevent the state's new and inconsistent claim.[21]

The state next claims exhibit 9, a letter from DOL dated February 28, 2003, "establishes that Cienfuegos' license was revoked for seven years beginning in 2003." BOA at 22. This considerably overstates exhibit 9. It is true that exhibit 9 provides notice the "driving privilege is revoked for 7 years as a habitual traffic offender. Authority: RCW 46.65.070." CP 459 (Ex. 9). The exhibit then references a hearing process, as well as methods to

[21] See, generally, Haslett v. Planck, 140 Wn. App. 660, 665, 166 P.3d 866 (2007) (the doctrine of judicial estoppel precludes a party from taking incompatible positions to its advantage in successive court proceedings; the doctrine preserves respect for judicial proceedings by avoiding inconsistency and duplicity, and prevents a party from playing fast and loose with the courts); accord, Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 906, 28 P.3d 832 (2001).

reinstate the driving privilege.[22] On its face, exhibit 9 does nothing more than show that in February 2003 DOL provided notice of a revocation that might take effect "on 03-30-2003." Ex. 9; CP 459. It does not show beyond a reasonable doubt that the revocation was not stayed, actually took effect, or was still in effect on April 15, 2005. CP 27 (state bore burden to prove "[t]hat at the time of driving an order of revocation was in effect"). Exhibit 9 does not, as the state now suggests, simply repeat the inadmissible testimonial statements in exhibit 10.[23]

The state next claims exhibit 11 cures the state's proof problem. BOA at 22. This part of the state's claim should be rejected for two reasons. First, the superior court held the trial

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[22] See, generally, RCW 46.65.065(1) (a party may appeal a revocation and "[a] request for a hearing stays the effectiveness of the revocation"); State v. Dolson, 138 Wn.2d 773, 777, 982 P.2d 100 (1999) ("In a prosecution for driving with a revoked license, the State has the burden to prove that the revocation of the defendant's license complied with due process"); State v. Nelson, 158 Wn.2d 699, 702-03, 147 P.3d 553 (2006) (due process requires state to provide notice and hearing before revocation); Devine v. State, Dept. of Licensing, 126 Wn. App. 941, 110 P.3d 237 (2005) (such appeals can be successful).

[23] This is why the state offered exhibit 10, which states the facts that are obviously missing from exhibits 9 and 11: "Had not reinstated his/her driving privilege. Was suspended/revoked in the first degree. Subject was not eligible to reinstate his/her driving privilege on the above date of arrest." Ex. 10.

court erred in admitting exhibit 11, and the exhibit should be excluded. CP 499-500. Where the state's motion and the court's ruling granting discretionary review did not identify that issue within the scope of review, the state's current complaint is not before this Court. See argument 2, infra.[24] The holding excluding exhibit 11 is the law of this case.[25]

Second, assuming the state could still harness exhibit 11 for some purpose in this Court, it is by no means clear what fact the exhibit proves. The gobbledygook of numbers and abbreviations on exhibit 11 (CP 461) might suggest something to an experienced reader of DOL records, but it does not speak clearly for itself. Nor

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[24] The motion for discretionary review does not identify specific issues, but the argument section challenges only the Melendez-Diaz holding. Exhibit 11 is nowhere mentioned in the argument. Motion for Discretionary Review (MDR) at 9-17. The ruling granting review cites RAP 2.3(d), noting the status of driving records under Melendez-Diaz "presents an issue of public interest." Appendix B.

[25] "Law of the case" may not be an entirely apt term, but there appears no better term to describe the unchallenged parts of a superior court's RALJ ruling. See generally, State v. Schwab, 163 Wn.2d 664, 672, 185 P.3d 1151 (2008) ("The law of the case doctrine provides that once there is an appellate court ruling, its holding must be followed in all of the subsequent stages of the same litigation") (citing Roberson v. Perez, 156 Wn.2d 33, 41-42, 123 P.3d 844 (2005) and Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 113-14, 829 P.2d 746 (1992)).

did the state's single witness make any effort to translate it into plain English. CP 318-22.[26]

The trial deputy conceded exhibit 11's problems in closing, stating "admittedly this is difficult to read" while asking the jury to instead rely on the summary provided in exhibit 10. CP 400, 446. The state's RALJ brief is even less helpful for the state's labor in this Court; the brief admits the trial deputy "encourage[d] the jury not to try to decipher the complex annotations on Exhibit #11, but rather to pay more attention to the 'summary' contained in the 'cover letter from the Department of Licensing.'" CP 446 (emphasis added). As the state explained further, "[c]learly the DOL's cover letter, Exhibit #10, was a much more concise and straightforward recitation of the evidence. As the prosecutor went through the elements of the two offenses she repeatedly encouraged the jury to refer back to Exhibits #9 and 10, and the facts contained therein." CP 446.

Where the state so clearly fled from exhibit 11 in the trial and RALJ courts, its late attempt to harness the exhibit in this Court is as surprising as it is meritless. A party cannot shift its legal position

[26] At one point in the transcript, the trial deputy admitted the abbreviations were not comprehensible without a "cheat sheet." CP 251.

from full speed reverse to full speed ahead without seriously damaging the party's transmission.

The state's last effort to prove the error harmless notes that Cienfuegos did not provide a license to the officer who stopped him. The state posits this "[s]urely" was "evidence that he did not have one." BOA at 23. The state's theory has been rejected at least twice already, with facts far more favorable to the state. In both cases the accused admitted he knew the license was suspended. State v. Smith, 155 Wn.2d at 503 (rejecting the state's claim that Smith's admission he knew his license was suspended in the first degree established the state's burden to prove the reason for the suspension); Jasper, 2010 WL 5392937 at *8 (the state claimed the confrontation error was harmless because Jasper testified he knew his license was suspended; Court of Appeals rejected the claim because the testimony "did not explain why his license was suspended").

For these reasons, the state's harmless error claim is meritless.

c. The Superior Court's Remedy is Appropriate.

After determining exhibits 10 and 11 were not admissible, the superior court recognized no other evidence showed the

habitual traffic offender revocation was still in effect. Where the admissible evidence was insufficient, the court vacated the conviction and remanded for dismissal. CP 498-500 (citing State v. Smith, 155 Wn.2d 496, 120 P.3d 559 (2005)).

The state now contends the court should have remanded for a new trial, not dismissal. BOA at 30-32. The state first claims "there was ample other evidence" that the license was revoked due to habitual traffic offender status and the revocation was still in effect in April, 2005. For the reasons stated in section 1b, supra, that claim is not accurate. The other evidence was neither "ample" nor argued to the jury in closing.

The Supreme Court has recognized that dismissal may be an appropriate remedy where the sole proof of an element is inadmissible and the remaining evidence is insufficient to sustain the conviction. State v. Chapin, 118 Wn.2d 681, 691-92, 826 P.2d 194 (1991). Because the superior court's decision is consistent with Chapin and Smith, it should be affirmed.

2. THE STATE'S ARGUMENTS 2 AND 3 ARE NOT PROPERLY BEFORE THIS COURT.

The superior court reversed the district court for several reasons. The court first held exhibit 10's admission violated the

confrontation clause, citing Melendez-Diaz. CP 495-98. The court also held: (2) exhibit 11 was inadmissible for other reasons, (3) the trial court erred in admitting documents which stated the "legal fiction" that Cienfuegos' license was "suspended or revoked in the first degree," and (4) evidence of speeding and arrest were improper and prejudicial. The superior court found these errors independently reversible. CP 499-500.

The state's motion for discretionary review challenged the superior court's Melendez-Diaz ruling. MDR at 2, 8-17. It did not mention any of the other rulings. MDR at 5-6.[27] Cienfuegos filed a response which properly focused solely on the Melendez-Diaz claim and the state's challenge to the exclusion of exhibit 10. Response, at 2-9.

The state's motion cannot now be stretched beyond its plain language. In the "statement of relief sought," the state requested a ruling on "the conflict between decisions of the Washington Supreme Court and the United States Supreme Court on the scope of the Confrontation Clause of the Sixth Amendment." MDR at 2.

[27] One sentence of the motion claims the superior court also erred in failing to find the error harmless "and in dismissing the case instead of remanding for retrial," MDR at 7, but no argument supports either claim.

The motion recognized this was but one issue "among the issues raised" in the RALJ appeal. MDR at 4. The motion then argued there was no confrontation violation, and the appellate court should grant review (MDR at 6-17) to resolve "the conflicting interpretations of Melendez-Diaz." MDR at 15.

The ruling granting review refers solely to the state's Melendez-Diaz claim, citing RAP 2.3(d) and noting the status of driving records under Melendez-Diaz "presents an issue of public interest." Review was not granted of any other issue. Appendix B.

Restricting review to properly raised issues is well within an appellate Court's authority. "Upon accepting discretionary review, the appellate court may specify the issue or issues as to which review is granted." RAP 2.3(e).[28] This rule grants the Court of Appeals similar authority to that granted the Supreme Court in RAP 13.7(b). Discretionary review is limited to the issues raised in a

[28] RAP 2.3(e) was amended in 2002, in response to Right-Price Recreation v. Connells Prairie, 146 Wn.2d 370, 46 P.3d 789 (2002). Right-Price had held when discretionary review is granted, its scope is the same as the scope of an appeal that follows a final judgment. 146 Wn.2d at 380. See, Tegland, 2A Wash. Prac., Rules Practice RAP 2.3 (6th ed. 2010) (discussing language of 2002 amendment). Right-Price has therefore been effectively overruled by the amendment. Right-Price also is not on point because it did not involve review of a RALJ decision under RAP 2.3(d).

motion and granted by the appellate court. City of Bothell v. Barnhart, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010) (refusing to address harmless error claim not raised in motion), rev. granted, __ Wn.2d __ (No. 84907-2, November 10, 2010); State v. Rosalez, __ Wn. App. __, __ P.3d __, 2010 WL 5298821, at *2 & *3 (2010) (recognizing that the ruling granting review limits the scope of review); Tapps Brewing, Inc. v. City of Sumner, 106 Wn. App. 79, 84-85, 22 P.3d 280 (2001) (ground for granting review limits scope of review).

The state's brief therefore exceeds the proper scope of the issues on review. BOA at 2-3 (issues 3, 4, 5, 6); at 23-30 (argument 2); at 30-32 (argument 3). This Court should either strike those parts of the state's brief, or decline to consider the arguments. See generally, State v. Korum, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006) (striking argument not properly raised on discretionary review); State v. Collins, 121 Wn.2d 168, 179, 847 P.2d 919 (1993) (declining to consider argument not properly raised in petition for discretionary review).

3. IF THE STATE'S ARGUMENT 2 IS PROPERLY BEFORE THIS COURT, THE SUPERIOR COURT SHOULD BE AFFIRMED.

In the trial court and in the RALJ appeal, Cienfuegos challenged the admission of exhibit 10's statement that the license was "suspended/revoked in the first degree" as irrelevant. CP 214-16, 318, 355-56. The superior court agreed. CP 500. This is fully supported by the Supreme Court's decision in Smith. Smith, 155 Wn.2d at 503-04. Cienfuegos challenged the unredacted exhibit 11 because it included irrelevant and unfairly prejudicial evidence of criminal driving offenses, the fact that Cienfuegos was speeding and arrested, and its date of "03-10-08" did not relate to the violation date of April 15, 2005. The superior court agreed. CP 321-22, 356-60, 499-500. This is fully supported by the authority cited in Cienfuegos' RALJ brief. CP 356-60.

4. IF THE STATE'S ARGUMENT 3 IS PROPERLY BEFORE THIS COURT, THE SUPERIOR COURT SHOULD BE AFFIRMED.

The superior court found exhibits 10 and 11 inadmissible, and determined the remaining evidence was insufficient to support conviction. CP 497-98. As set forth in argument 1c, supra, the ruling is consistent with Smith and Chapin and should be affirmed.

D. CONCLUSION

The superior court properly reversed the conviction and remanded for dismissal. The parts of the state's brief that exceed the scope of review should be stricken. This Court should affirm the superior court.

DATED this 31st day of January, 2011.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

ERIC BROMAN, WSBA 18487
Office ID No. 91051
Attorneys for Respondent

Today I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys of record ~~of Respondent~~/appellant/plaintiff containing a copy of the document to which this declaration is attached. Sent to KCT - 9/30 via email
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Done in Seattle, WA 1/31/11
Name Date

APPENDIX A

No. 64437-8-I

16498214

PLAINTIFF'S EXHIBIT

CIENFCV370MQ 20030330

STATE OF WASHINGTON Department of LICENSING

NOR 7 YEARS 3CHO

PO Box 9030, Olympia, WA 98507-9030

ORDER OF REVOCATION
FEBRUARY 28, 2003 FILE COPY

#3
CIENFUEGOS,CESAR VALADEZ
11204 31ST AVE SE
EVERETT, WA 98204

LICENSE NO: CIENFCV370MQ

BIRTHDATE: 07-18-1963

ON 03-30-2003 YOU MUST STOP DRIVING A MOTOR VEHICLE IN THIS STATE. IF YOU HAVE A WASHINGTON STATE DRIVER'S LICENSE IN YOUR POSSESSION IT MUST BE SURRENDERED TO THIS DEPARTMENT.

YOUR DRIVING PRIVILEGE IS REVOKED FOR 7 YEARS AS A HABITUAL TRAFFIC OFFENDER. AUTHORITY: RCW 46.65.070

A HEARING REQUEST FORM IS ENCLOSED.

TO REINSTATE YOUR DRIVING PRIVILEGE REFER TO PARAGRAPHS A,B,E ON THE ENCLOSED REINSTATEMENT SHEET. DO NOT DRIVE UNTIL YOU HAVE BEEN NOTIFIED OF REINSTATEMENT BY THIS DEPARTMENT.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT I CAUSED TO BE PLACED IN A U. S. POSTAL SERVICE MAIL BOX, A TRUE AND ACCURATE COPY OF THIS DOCUMENT TO THE PERSON NAMED HEREIN AT THE ADDRESS SHOWN, WHICH IS THE LAST ADDRESS OF RECORD, POSTAGE PREPAID, CERTIFIED MAIL, ON FEBRUARY 28, 2003.

Lucy A. Lang

AGENT FOR THE DEPARTMENT OF LICENSING
SUSPENSION/REINSTATEMENT SECTION
PHONE: (360) 902-3900
CERTIFIED MAIL NUMBER

7000 0520 0024 7450 0077

PLEASE INCLUDE YOUR DRIVER LICENSE NUMBER, FULL NAME AND DATE OF BIRTH ON ALL CORRESPONDENCE.

STATE OF WASHINGTON OFFICIAL SEAL DEPARTMENT OF LICENSING

16498214

PLAINTIFF'S EXHIBIT 10

STATE OF WASHINGTON
DEPARTMENT OF LICENSING
P. O. Box 9030 • Olympia, Washington 98507-9030

May 9, 2005 dcb

The attached document(s) is/are a true and accurate copy of the document(s) maintained in the office of the Department of Licensing, Olympia, Washington. All information contained in this report pertains to the driving record of:

Lic. #: CIENFCV370MQ
Name:CIENFUEGOS, CESAR VALADEZ
15426 ESTHER AVE NE
MONROE WA 98272

Birthdate: July 18, 1963
Eyes: BRN Sex: M
Hgt: 6 ft 00 in Wgt: 200 lbs
License Issued: June 25, 1999
License Expires: July 18, 2003

After a diligent search of the computer files, the official record indicates on April 15, 2005, the following statements apply to the status of the above named person:

Had not reinstated his/her driving privilege. Was suspended/revoked in the first degree. Subject was not eligible to reinstate his/her driving privilege on the above date of arrest.
Had not been issued a valid Washington license.
A notation has been placed on the driving record under RCW 46.20.720 stating that the person may operate only a motor vehicle equipped with an ignition interlock or other biological or technical device from 10/20/2002 to 10/20/2005.

Attachments: (if any)

Order of revocation; hearing request and return receipt March 30, 2003

Having been appointed by the Director of the Department of Licensing as legal custodian of driving records of the State of Washington, I certify under penalty of perjury that such records are official, and are maintained in the office of the Department of Licensing, Olympia, Washington.

Denise Bausch

Denise C. Bausch
Custodian of Records
Place: Olympia, Washington
Date: May 09, 2005

STATE OF WASHINGTON • OFFICIAL SEAL • DEPARTMENT OF LICENSING

The Department of Licensing has a policy of providing equal access to its services.
If you need special accommodation, please call (360) 902-3900 or TTY (360) 664-0116.

16498214

PLAINTIFF'S EXHIBIT 11

03-10-08 01 ABSTRACT OF COMPLETE DRIVING RECORD
THE FOLLOWING IS A TRUE AND CORRECT COPY OF THE IN
MAINTAINED
BY THE DEPARTMENT OF LICENSING AT OLYMPIA, WASHINGTON.
INSURANCE COMPANIES
ARE LIMITED TO A 3 YEAR RECORD. EMPLOYERS ARE ENTITLED TO A
FULL RECORD.

LIC# CIENF-CV-370MQ STATUS:
CIENFUEGOS,CESAR VALADEZ DOB 07-18-1963
R/15426 ESTHER AV NE SEX M EYES BRN LICENSE ISSUED 06-25-99
R/MONROE WA 98272 HGT 6'00" WGT 200 LICENSE EXPIRED 07-18-03

RESTRICTIONS: FIN RESP
PX PROBATIONARY LICENSE REQUIRED
$150 REISSUE FEE
CURRENT R/ADDR CHG REA/REQ/EFF DS 121807 122007
NOTE: R/DO 082006 053007 DO 041505 060705 M/
NOTE: 97094G
> 040504 DRIVING W/O LIABILITY INS FTA M SEATTLE 10593825
> 041505 SPEEDING FTA D KING CO I04371528
> 072703 DWLS/R 3RD DG FTA D SOUTH C00011631
> 082006 DWLS/R 1ST DG FTA D EVERGREEN C5008616M
* 110898 DUI =>0.15 BAC .24 061200J M LAKE FOREST CR03200
* 032500 DUI <0.15 BAC-2ND OFNS 102000 D BELLEVUE BC123571
* 110703 DWLS/R 1ST DG 120103J M KIRKLAND C20025K
* 110703 DISOBEY SIGNALMAN/OFFICER 120103J M KIRKLAND
C21826K
* 072703 DWLS/R 3RD DG 041504J D SOUTH C011631
* 040504 DWLS/R 1ST DG 083104 M SEATTLE 10231572
* 040504 DRIVING W/O LIABILITY INS 083104 M SEATTLE 10593825
* 022204 DWLS/R 2ND DG 072905 D KING CO EAST CR24578
* 022204 VIOL OF INTERLOCK REST 072905 D KING CO EAST
CR24578
* 082006 DWLS/R 1ST DG 041807 D EVERGREEN C5008616M
031799 PROB DI DEFERRED PROSECUTION 031704 031799
061200 VIOL DP VIOL TREATMENT 001108980000
111798 DR 1ST ADM PER SE - PROB 111703 111798 110898.24.25
111798 DR PROBATIONARY STATUS 010704 010799 1108980000
030299 DR PROBATIONARY LIC STATUS 010704 010799 1108980000
072500 DR PROBATIONARY STATUS 061206 061201 1108980000
110300 DR PROBATIONARY STATUS 102007 102002 0325000000
033003 REV DR HABITUAL OFFENDER 033013 033007
033010 REV DR DWLS/R 1ST DG 033013 033011 1107030000
033011 REV DR DWLS/R 1ST DG 033013 033012 0405040000 0000
033012 REV DR DWLS/R 2ND DG 033013 033013 0222040000 0000
033013 REV DR DWLS/R 1ST DG 033014 033014 0820060000 0000
061200 REV SR DUI=>0.15 BAC 061204 061201 110898.00.24
102000 REV SR DUI<0.15BAC-2ND OFNS 102005 102002
032500.00.00

STATE OF WASHINGTON OFFICIAL SEAL DEPARTMENT OF LICENSING

APPENDIX B

No. 64437-8-I

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
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January 14, 2010

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Attorney at Law
The Public Defender
810 3rd Ave Fl 8
Seattle, WA, 98104-1655

CASE #: 64437-8-I
State of Washington, Petitioner v. Ceasar Valadez Cienfuegos, Respondent

Counsel:

The following notation ruling by Commissioner William Ellis of the Court was entered on January 13, 2010, regarding Petitioner's Motion for Discretionary Review:

> The State seeks discretionary review of a superior court decision reversing a district court conviction for driving while license suspended and violation of an ignition interlock requirement. The superior court held that the State's use at trial of a certified copy of the driving record violated Cienfuegos' right to confrontation under Melendez-Diaz v. Massachusetts, U.S., 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).
>
> Review under RAP 2.3(d) is appropriate if the superior court's decision involves an issue of public interest which should be determined by an appellate court. As driving records are routinely offered as proof in many different types of cases, their status under Melendez-Diaz presents an issue of public interest. This same issue is already before the Court in State v. Moi Moi, cause number 64327-4. However, Moi Moi involves a different fact pattern and a different type of document. Having both cases before the Court will better inform it in deciding the issue. Review shall accordingly be granted in this case and it shall be linked for argument and disposition with Moi Moi.
>
> Now, therefore, it is hereby
>
> ORDERED that the State's motion for discretionary review is granted; and, it is further
>
> ORDERED that this case be linked with State v. Moi Moi, cause number 64327-4.

Sincerely,

Richard D. Johnson

Court Administrator/Clerk

LLS